IN THE

Supreme Court of the United States

October Term, 1942

No. 332

LEROY J. LEISHMAN,

Petitioner,

v.

ASSOCIATED WHOLESALE ELECTRIC COMPANY, a Corporation,

Respondent.

RESPONDENT'S ANSWERING BRIEF OPPOSING GRANT OF WRIT OF CERTIORARI

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The pertinent Rules of Civil Procedure applying to this cause are Rules 6(b), 52(a) and (b), and 59(a), (b) and (c) which, for convenience of the Court, we quote in the Appendix.

As stated by Petitioner, the chronology as shown on the Docket of the District Court was as follows:

Opinion of the District Court	Jan. 1, 1941
Extension of Time to Plaintiff to File Motion under Rule 52(b)	Apr. 28, 1941

Judgment and Findings of the District Court	May 1, 1941
Motion under Rule 52(b) (now insisted as being in effect a Motion for Rehearing)	May 28, 1941
(27 days after the Judgment)	
Motion denied	June 9, 1941
Appeal notice filed	Sept. 4, 1941
(4 months and 3 days after the entry of the Judgment).	

At the outset, it should be noted that the Court of Appeals treated the motion of Petitioner, which was entitled "Motion under Rule 52(b) of the Rules of Civil Procedure for the District Court of the United States," as nothing but a motion under Rule 52(b). As such, the motion was filed within time, because an extension had been granted for time to file the same under Rule 6(b). It should be noted, also, that the extension was only granted for a Motion under Rule 52(b).

However, the Petitioner contends that his motion is more than a motion under Rule 52(b) and that it also asks for an amendment of the conclusions of law and a modification of the judgment to such an extent that if granted it would result in the exact opposite conclusion from the judgment as it was handed down by the District Court. That is, the Petitioner seems to contend that the relief prayed for in his motion is of the type provided for in Rule 59 relating to new trials and rehearings.

It will be noted that Rule 59 is the only rule whereunder such relief can be granted, and that Rule 52(b) relates to correction of findings or the making of additional findings and does not permit the review in any way of the *conclusions of law* or in the *ultimate outcome* of a cause. If indeed, as specifically permitted in Rule 52(b), the Petitioner had *combined a motion under Rule 59*, then we must see whether, considering the aspects of the motion as one

under Rule 59, it was filed within such time as to suspend the three months for filing notice of appeal.

In other words, did the Court of Appeals have properly before it a motion under Rule 59 to modify the result of the judgment, or for a new trial or rehearing, or whatever it may be termed? The answer to this question must be that it did not because the motion in question was *not* filed within ten days of the entry of judgment and it was not based on newly discovered evidence.

Rule 59(b) specifically specifies that a motion for a new trial shall be served not later than ten days after the entry of judgment with the only exception being when the motion is based on the ground of newly discovered evidence. Rule 59(c) relates to the right of extending time for filing affidavits. Rule 6(b) relates to the enlargement of time generally and the right to the same, but specifically states that the period for taking any action under Rule 59 *may not be enlarged except as stated in subdivision (c) thereof* which, as heretofore stated, merely refers to affidavits. Therefore, there can be no valid motion for a new trial filed after ten days from the judgment entry whether or not there has been an extension permitted by the District Court, and if Petitioner's motion included a motion under Rule 59, then that portion thereof (which sought a reversal of the decree), was not properly before the Court since it was filed out of time.

The Court of Appeals properly could have done nothing but treat the motion as one under Rule 52(b) as it did. Its legal conclusion based on this supposition towards the motion was correct and is not contested in the petition. The Court did not go on to say that in its aspect of being a motion for a new trial or to modify the judgment under Rule 59, the document had not been filed within time since the extension of time for filing such a motion had not been

granted, and if granted, would be invalid. It simply took the motion for the only purpose for which it could be validly before it.

The outcome, namely that Petitioner had not filed his appeal within the time provided for by law and thus had no valid appeal, was correct. The reasoning basing itself on the conclusion that the motion was a motion under Rule 52(b) and hence did not serve to extend the time, was correct. Now that Petitioner brings up the point which in effect is no more than a plea that his motion should be considered as one under Rule 59, and since under Rule 59 time cannot be extended for filing the motion, still the result is the correct one, because no valid motion under Rule 59 was cognizable by the District Court since it had not been filed within the ten days.

Justice Cardozo in *Zimmern et al.* v. *United States,* 298 U. S. 167, was not dealing with a motion for rehearing filed after ten days from a decree.

The case of *Fiske* v. *Wallace,* 115 Fed. (2d) 1003, referred to by the Petitioner is not believed to be controlling. The portion referred to by the Petitioner is obiter dicta. The point was not actually decided since the notice of appeal was filed in time. The Rules of Civil Procedure cannot be considered to have intended to modify the clear provision of Rule 6(b) and Rule 59, by means of statements made in Rule 52. By greatly relaxing the provisions for procedure in instituting appeals, it appears clear that the drafters of the rules considered that there was no reason why appeals should not be filed within 3 months of the decree complained of. Certainly the obvious device of labeling a motion for rehearing as being a motion under Rule 52(b) cannot be said to defeat the provisions of Rule 59.

It would appear to be unnecessary for this Court to accept the petition and issue the writ prayed for in order

to amplify the decision of the Court of Appeals by the mere comment that if Petitioner's motion is in effect a motion under Rule 59 that it was filed too late.

As a ruling of law on the factual basis stated therein the decision of the Court of Appeals is sound, and since the only factual issue brought up by the Petitioner in his present petition does not change the final result, the petitioner should fail.

Respectfully submitted,

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APPENDIX

Rule 6. Time.

(b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.

Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

(b) AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings

of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Rule 59. New Trials.

(a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) TIME FOR MOTION. A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence.

(c) TIME FOR SERVING AFFIDAVITS. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.